

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP951
STATE OF WISCONSIN**

Cir. Ct. No. 2011CV3396

**IN COURT OF APPEALS
DISTRICT IV**

HALLIS DAVID MAILEN,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN EDUCATIONAL APPROVAL BOARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
FRANK D. REMINGTON, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Hallis Mailen appeals an order affirming a decision by the Educational Approval Board (EAB) to close without action Mailen's complaint that the Madison Media Institute (MMI) violated its own rules and acted in a discriminatory manner when it expelled Mailen from the school. He argues

that MMI violated the Enrollment Agreement when it failed to give him a written notice of termination and an opportunity to appeal, that MMI violated school policies when it failed to accommodate his disability, that MMI discriminated against him based on disability and age, and that the EAB did not lawfully delegate the decision to close the investigation to its staff. We affirm the circuit court's order.

¶2 Mailen enrolled at MMI for the fall term of 2009. In November 2009, MMI notified Mailen that he was being placed on probation because of unprofessional and disrespectful behavior. In June 2010, Mailen's enrollment at MMI was terminated, and his request for re-entry was denied in a letter dated August 11, 2010. Mailen filed a complaint with the EAB on June 9, 2011, alleging that MMI failed to provide him with a written notice of termination and an opportunity to appeal and that MMI violated school policies and law when it discriminated against him on the basis of disability and age. Mailen included with his complaint a letter from his attorney, his student records at MMI, which included email reports from instructors and others about Mailen's behavior, and records related to a complaint he filed with the Office for Civil Rights of the United States Department of Education (OCR), which included detailed written responses Mailen made to specific questions posed to him by the OCR. By letter dated June 29, 2011, the EAB informed Mailen that it found no credible basis to his complaint and it was closing his complaint without action. Mailen appealed under WIS. STAT. § 227.52 (2011-12),¹ and the circuit court affirmed the EAB's decision.

¹ All references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

¶3 Under WIS. ADMIN. CODE § EAB 4.08(2)(b) (Apr. 2006), the EAB investigates student complaints, and attempts to mediate a settlement between the student and school if the EAB’s preliminary findings indicate a violation of an established school policy. On appeal, we review the decision of the EAB, not that of the circuit court. *See State ex rel. Sprewell v. McCaughtry*, 226 Wis. 2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999). We determine de novo whether the EAB acted within its jurisdiction, whether it acted according to applicable law, whether the action was arbitrary and unreasonable, and whether the evidence supports the decision. *Id.* Where, as here, no hearing was conducted, the question on review is whether the facts compel a particular result as a matter of law. *R.W. Docks & Slips v. DNR*, 145 Wis. 2d 854, 860-61, 429 N.W.2d 86 (Ct. App. 1988).

¶4 Mailen first argues that the facts compel a preliminary finding that MMI did not comply with its Enrollment Agreement requiring that expelled students be given written notice of termination and an opportunity to appeal.² We do not agree.

¶5 The Enrollment Agreement between MMI and Mailen provides:

² The EAB determined that “MMI missed a step in following its student conduct policies” because MMI did not issue a formal letter of dismissal, but that the error was of no consequence because of the history that led MMI to deny Mailen re-entry. The student conduct policy referenced by the EAB was included in a school catalog and provides, in part:

We expect mature behavior from all of our students and will not allow actions that are detrimental to the rights of others. A student may be dismissed for any form of disruptive or offensive behavior in class A dismissed student has the right to appeal the dismissal through a written letter to the school director.

This policy does not require written notice of termination.

Cancellation by the School

Madison Media Institute reserves the right to dismiss any student, prior to completion of training, for failure to comply with the rules and regulations of the school including, non-attendance, unsatisfactory grades or progress, inappropriate behavior, or non-payment of tuition.

A student has the right to appeal a decision to terminate his/her enrollment within ten (10) days of the date of the notice of termination. Appeals must be submitted in writing to the director of the school.

The agreement does not require MMI to give written notice of termination.

¶6 Mailen's complaint that without written notice he did not know of his right to appeal or when to appeal does not persuade us. Mailen admitted in his complaint to the EAB that, "[i]n June 2010, Mailen was summarily expelled from MMI." In his answers to the OCR, Mailen described a conversation he had with MMI's president in late June 2010 centering on whether to allow Mailen to return to school. The conversation demonstrates that Mailen knew he had been terminated. MMI's president informed the EAB that, in his conversation with Mailen, he told Mailen that he could appeal the dismissal. An August 11, 2010 letter denied Mailen's request to re-enter the school for the fall semester, again demonstrating that Mailen had been terminated. The facts compel a preliminary finding that MMI did not violate the Enrollment Agreement or deny Mailen his opportunity to appeal. The EAB properly refused to pursue that aspect of Mailen's complaint.

¶7 Next Mailen argues that the facts compel a preliminary finding that MMI violated its own policy of providing accommodations to students with

disabilities.³ He first claims the EAB did not adequately investigate MMI's handling of his accommodation requests because the EAB did not acquire MMI's disability policy or Mailen's medical records documenting his disability. Our standard of review does not reach whether an agency has conducted an adequate investigation. *See* WIS. STAT. § 227.57(4), (5), (6), (8). We look only at the decision made, and review of the decision is confined to the record utilized by the EAB. WIS. STAT. § 227.57(1).

¶8 Mailen sets forth in his appellant's brief MMI's "Disability Rights and Responsibilities Policy." The policy provides, in part, that MMI has the right to "[r]efuse unreasonable accommodations, academic adjustments or auxiliary aids and service requests that impose a fundamental alteration on a program or activity" of MMI. The EAB did not have the policy before it. Mailen argues that there has been no evaluation of whether his requested accommodations would have imposed a fundamental alteration of MMI programming. We do not look to compliance with the policy because Mailen did not fulfill his responsibilities under the policy to "[d]emonstrate and/or document (from an appropriate professional) how the disability limits their participation in courses and programs." Not until Mailen filed his "Voluntary Disability Self-Disclosure Form" on July 13, 2010, after his dismissal, did Mailen provide the required documentation.⁴

³ Mailen identifies himself as disabled because he suffers from posttraumatic stress disorder (PTSD) as a result of military service.

⁴ It is not clear from the record whether Mailen's submission of the "Voluntary Disability Self-Disclosure Form" included the letters from his doctors about Mailen's PTSD. Those letters are not part of the school records Mailen produced when he filed his complaint with the EAB.

Even if Mailen's July 13, 2010 filing gave rise to an obligation on MMI's part to evaluate Mailen's accommodation requests under the disability policy, the failure to do so does not matter.

(continued)

¶9 We look to the record before the EAB to evaluate its preliminary finding that MMI did not fail to provide Mailen reasonable accommodations when requested. The EAB observed that, in his application for admission, Mailen indicated “no” when asked whether he needed special accommodations in the classroom in order to be successful. In his first term in 2009, Mailen requested one instructor to slow the pace of the class, adjust his teaching style, and provide more time with teaching assistants. The instructor responded that it was not possible to slow down because of the amount of content to be covered. Mailen asked if he could be assigned his own personal tutor and was told that such a request was not within the school’s budget. Mailen was told that he could come in on his own time between classes to meet with instructors or interns. Mailen refused to come in on his own time and did not think he should have to do that. The availability of mentoring was discussed with Mailen, but he refused that type of assistance. When Mailen requested more one-on-one time with an instructor, the instructor indicated a willingness to do that, but by email or in private, not in class in front of other students. Mailen also asked instructors and administrators to intervene to protect him from taunts and rudeness of his classmates. In his “Voluntary Disability Self-Disclosure Form,” filed with MMI on July 13, 2010, Mailen asked for one-on-one assistance and tutoring with a knowledgeable instructor, a tutor assigned only to him, assistance in class by a tutor assigned only to him, and “reasonable accommodations in lieu of public transportation shortcomings.”

The denial of re-entry was based on language in an email message Mailen authored July 29, 2010, which demonstrated threats to the safety of others at the school. Mailen’s own doctor stated that Mailen’s disability “does not excuse him from ... threatening or otherwise inappropriate behavior at school.” Mailen’s threatening behavior supports his termination, regardless of the adequacy of MMI’s attempt to provide accommodations.

¶10 The record demonstrates that MMI reasonably denied Mailen's accommodation requests. One instructor reasonably explained that he could not slow the pace and reduce the amount of content to be covered. Mailen wanted more one-on-one time with instructors and tutors, but only in class. Instructors, reasonably, were not willing to draw class time away from other students. It was not in MMI's budget to provide Mailen with the high level of assistance he sought, a tutor assigned to him full-time and exclusively, but MMI offered alternatives, which Mailen refused.

¶11 Regarding other related issues, we make the following observations. Mailen was given permission by at least one instructor to leave class and take a walk to calm down when he had a problem with classmates. MMI could not rectify the shortcomings of public transportation.

¶12 The facts compel a preliminary finding that MMI did not refuse to provide reasonable accommodations. The EAB properly refused to take action on Mailen's complaint that he had been denied reasonable accommodations.

¶13 Mailen argues that the EAB should have evaluated his complaints of disability and age discrimination in the context of federal law and regulations. The EAB is charged to protect the general public:

by inspecting and approving private trade ... schools doing business within this state, ... changes of ownership or control of the schools, teaching locations used by the schools, and courses of instruction offered by the schools and regulate the soliciting of students for correspondence or classroom courses and courses of instruction offered by the schools.

WIS. STAT. § 38.50(2). The EAB is not an agency charged with the prosecution of violations of federal discrimination laws. The EAB properly refused to take

further action based on Mailen's complaint that federal discrimination law and regulations were violated.

¶14 Mailen's final argument is that the EAB's decision is invalid and void because it was not made by members of the board or by an official who was lawfully delegated to make a decision to close a complaint. The EAB's decision reflects that Mailen's complaint was investigated by a "School Administration Consultant." That same person authored and signed the letter explaining to Mailen that his complaint was being closed.

¶15 Mailen points to the language in WIS. ADMIN. CODE § EAB 4.08(2)(b) (Apr. 2006) that "[t]he board shall conduct an investigation" and that "the board" shall attempt mediation to bring about a settlement. Under WIS. STAT. § 38.50(5), the EAB shall employ an executive secretary and "other persons under the classified service that may be necessary to carry out the board's responsibilities. The person performing the duties of the executive secretary shall be in charge of the administrative functions of the board." Mailen reads that section as a requirement that the executive secretary is limited to performing administrative functions. Mailen contends that the board cannot delegate its decision making and discretionary authority to the executive secretary or staff. However, under § EAB 3.03 (Jan. 2013), the board has delegated authority to the executive secretary to act as its agent "regarding *all matters* under chs. EAB 4 to 11." (Emphasis added.) Mailen's complaint thus falls within matters delegated to the executive secretary. The executive secretary can, in turn, assign staff to investigate and act on student complaints. The EAB's decision is not invalid or void.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

